

**RUMSON PLANNING BOARD
DECEMBER 3, 2012
MINUTES**

Chairman Lospinuso called the regular meeting to order at 7:30 p.m. with the Pledge of Allegiance. The requirements of the Open Public Meetings Act were stated as met. The roll was called, with the following members present: Lospinuso, Casazza, Shanley, Williams, White, Clark, Koenig, Hewitt, Rubin. Also present: Michael Steib (Board Attorney), Fred Andre (Zoning Officer), and State Shorthand Services.

Approval of Minutes

Motion was made and seconded to approve the minutes from the October 22, 2012, and November 12, 2012, meetings. Voice Vote: Ayes, unanimous.

Memorialization of resolution adopting the Master Plan Reexamination Report

Chairman Lospinuso thanked the Board for their work on this report. Vice-Chairman Casazza moved to adopt the resolution, and Mrs. White seconded.

Roll Call Vote: Ayes – Lospinuso, Casazza, Shanley, Williams, Clark, Koenig, Hewitt, Rubin
Nays – None

Motion carried.

Chairman Lospinuso also thanked Ms. Heard and her team for putting together the report.

Consistency Review Proposed Ordinance Amendment to Chapter XXII Development Regulations

Ms. Heard noted that this item was also included in the Master Plan Reexamination Report and was one of the recommendations. Mrs. White moved to deem the amendment consistent with the current Master Plan. Councilman Rubin seconded.

Roll Call Vote: Ayes – Lospinuso, Casazza, Shanley, Williams, Clark, Koenig, Hewitt, Rubin
Nays – None

Motion carried.

Roy & Catherine Carman, 9 Edgewood Road

Mr. Steib reported that the application is for a minor subdivision. He noted that there has been a flurry of letter writing on this application over the last week regarding some technical objections to the Board's jurisdiction to hear this case. He reviewed the letters received from the attorneys, Mr. Von Arx and Mr. Gaziorowski. He summarized the issue, noting that this property was created as part of a subdivision in 1973, which was approved and created the lot which is the subject of the application this evening. The owner of the larger parcel conveyed a portion of their lot to Lot #4, and approval was given on the condition that no dwelling should be erected on the portion of the property added to Lot #4. This portion is mostly in the R-1 Zone accessed from Bellevue Ave., if this subdivision is approved.

Mr. Gaziorowski thinks there is a restriction with the original approval that states no residence be constructed on that portion of the property. The governing body intended that restriction to occur with this property, and if this is to be relieved, notice must be given to the public. The notice sent out by this applicant had no mention of this condition, and Mr. Gaziorowski feels the notice was inadequate. Mr. Steib said that the statute that governs this says that notice should be given for the modification or eliminations of conditions of the resolution.

At this point, they have not been able to find the memorialized resolution from 1973. Mr. Gaziorowski submitted some minutes, but no resolution could be found as yet. Also, they have not seen anything that

says whether or not this was a public noticed hearing, as it was a minor subdivision and under some circumstances, some minor subdivisions do not require a notice be published. An additional objection was made to the notice of hearing because a subdivision has its access through an easement area that goes out to Bellevue Ave., and Mr. Gaziorowski has cited a case in the Superior Court from 1992 which required a secondary access by acquiring easements through another street. No notice was made to the property owners of the easement areas, and the court agreed that they should have been given notice.

Mr. Von Arx's response is that the note on the filed map plan relates to a private agreement between the two property owners, and there is a deed which contains a restriction that says the portion given to the property owner would not be developed; however, in the deed it says that the restriction would expire when this owner no longer owned the property, which has occurred in this case. The intent of the lot in the plan was not imposed by the governing body but between property owners themselves to restrict the use of the property. When the owners no longer owned the property, that restriction no longer applied, and Mr. Von Arx feels there is no restriction at this time, because the private agreement expired. Also, Mr. Von Arx contends that his notice contained wording to say that they would comply with any conditions that the Board would impose. He feels his notice was "all inclusive" and should cover all bases. He also does not think the court case cited by Mr. Gaziorowski applies to this application, since the driveway has been there for many years and serves the one lot and will continue to serve the one single-family lot. It is not a new street and will not be serving anything else than what it currently serves. He feels his application has been correctly filed and noticed, and he wants to move forward.

Mr. Steib advised that the removal of the condition for a specific form of relief that identifies it as a form of relief should have been specifically mentioned in the notice, and he does not think the Board has jurisdiction to consider the matter of the restriction. They have noticed for the subdivision and variance approval, and the board does have jurisdiction to hear this; however, any resolution would need to recognize the restricted covenant before the subdivision can be perfected. He does not think this Board has jurisdiction to hear the issue of the restriction. It was not imposed by this Board, and was possibly imposed by the governing body. Also, there is case law says covers deed restrictions such as this, and he reviewed a 1990 case and a more recent case that deal with this type of issue where it was found that the removal of this type of restriction lies with the Chancery District of the Superior Court. He thinks this Board should proceed with the subdivision application, and include in the resolution the requirement that any final map filed resolve this issue.

Councilman Rubin thinks they would need to consider a completeness review, and it appears that some documents have not yet been submitted. Ms. Heard recalled that completeness waivers were granted at the original hearing for this application. Councilman Rubin asked if it is prudent to proceed with the completeness waivers, knowing that these issues are on the table. It is a fairly complex application, and there will be many legal challenges. He is not sure how to proceed on this. They could proceed and put on the record the opinions of the Board members.

Chairman Lospinuso asked the Board how they felt about continuing with the application at this time.

Mr. Shanley is not sure if the applicant would want to continue after hearing all this.

Councilman Rubin said they could grant a completeness waiver, knowing that the findings could change the outcome of what they ultimately decide.

Mr. Hewitt thinks they should proceed, and he asked about the agreement between the private parties and when the home owner no longer owned the property.

Mr. Von Arx feels the agreement no longer stands in this case. The objectors will say that the governing body may have put the restriction on the plan regarding not allowing building a residence on the second part of the lot. This restriction can be lifted by the private property owners.

Mr. Steib does not think this Board has jurisdiction to remove this restriction; however, they can grant the subdivision and decide if they want to grant it.

Councilman Rubin thinks they should hear the subdivision on its merits alone, and not consider the matter of the restriction. This would mean the Board would consider granting the subdivision, variances, etc., and whether it is the right thing to do. If they do not think it should be approved as a subdivision, they could deny the application.

Chairman Lospinuso thinks it is awkward for the Board to hear something that is out of their jurisdiction and may never be approved.

After further discussion, Councilman Rubin moved to go forward and hear the application on its own merits of the subdivision based on land use only. Any finding should not be deemed positive or negative for any future court case. Mr. Casazza seconded.

Roll Call Vote: Ayes – Lospinuso, Williams, Hewitt, Casazza, Rubin, Clark

Nays – Shanley, Koenig, White

Motion carried.

Brooks Von Arx, attorney, appeared on behalf of the applicants. Having heard the Board's discussion, he is prepared to move ahead with the subdivision application. If this is approved, they would proceed with the next step, which is verification that the restriction in the 1973 subdivision plat was a personal restriction and not proposed for the benefit of the Borough of Rumson. If the Board approves the application, they understand that there would need to be a resolution of the issue of the restriction. Councilman Rubin again noted that this is outside of the Board's purview, as was stated in the motion.

Mr. Von Arx described the property in question, via a plot plan provided. The front half fronts on Edgewood Road, and the south half has access by way of a 40' right-of-way which has existed for a number of years. They propose to divide the property into two lots. Their property would be subdivided in the R-1 Zone. The other lot is in the R-3 zone. The 40' right-of-way was shown on the tax map, which also shows the two lots in question. Another small area was shown that currently belongs to the Borough of Rumson. They will be conforming to the R-1 and R-3 zones with their application. A blow-up of the tax map was marked A-7. Mr. Steib advised the Board of the other exhibits received so far:

- A-1 Application
- A-2 Minor Subdivision plan dated 11/4/11, revised 2/7/12
- A-3 Completeness review by T&M Assoc, dated 1/30/12
- A-4 Application revised 2/10/12
- A-5 Site Plan and floor plans dated 2/10/12
- A-6 Landscape plan, dated 2/21/12

A copy of the deed to show his client's ownership was also presented and marked A-8 (6/12/1989), as well as a copy of a title insurance policy to also show the ownership of his clients.

Mr. Gaziorowski noted his objection to the submission of the title insurance policy, because it contains information he thinks is hearsay at this point. Michael Leckstein, attorney representing an adjoining property owner, also offered his objection to the submission of the title insurance. He does not think it is proper for the Board to consider this. Mr. Steib said it will be marked A-9 for identification purposes only.

Richard Groves, architect, was sworn in, and the Board accepted his qualifications. He understands they are only dealing with the matter of the subdivision, and his presentation would be based on the assumption that there is no restriction against building on the property.

Mr. Gaziorowski has no questions on Mr. Groves' qualifications as an architect; however, it seems he will be testifying as to the layout and plans of the house, and he does not think he is qualified to give testimony as to the planning of the property, etc.

Mr. Groves continued his testimony to report that he was asked to design a smaller retirement home for the Carman's on the property. The lot is about 2.5 acres in size (lower portion is 1.5 acres and the higher portion is 1 acre). The portion along Edgewood has a house and pool. The rear section was used as a garden area. In designing the house, Mr. Groves took into consideration the setbacks and visual constraints of the lot, and he explained their plan for the improvements, noting the setbacks and garage, which are all conforming. The proposed height is 35', and the proposed size is 3,900 sq. ft. Sheet #1 of the site plan was referenced in this testimony.

The proposed location of the house was based on the existing topography of the land, and they attempted to minimize the impact on the right-of-way on the property, as well as maintaining the garden theme on the lot. They also asked for the house to be oriented so that they may be able to utilize solar energy at some time, and the primary living spaces are on the south side. They were also concerned with the aesthetics as they relate to the surrounding neighbors, and their orientation was taken into consideration so as to consider the gardens and provide a softer appearance. The building, as proposed, looks less massive to people coming down the road.

Mr. Groves noted heavy buffering around the perimeter, and they have added substantial buffer as well, to the existing trees on the lot. They would be willing to modify the plan to add even more buffer, if required. An area shown on the map as a striped green area represents a conservation easement. It is 65' x 250' in size. The Carmans' are willing to dedicate this area to the benefit of the Borough of Rumson, still maintained by the property owner, with restrictions as to clear cutting, building, etc. Mr. Groves stated that if this property were to be sold to a developer, a much larger home could be constructed.

Mr. Casazza asked about the mention of the easement, and Mr. Von Arx showed the Board the 40' right-of-way on Bellevue Ave. to the west end of their property, terminating at the piece of property owned by the Borough. The right-of-way serves the subject property, as well as two other properties. The advantage of the easement provides space for them to meet the R-1 requirements, protection for the one lot, and provides a benefit to the Borough.

Michael Leckstein, attorney representing the owners of Lot#3, Mr. & Mrs. Tate, asked Mr. Groves which property was higher. Mr. Groves stated the two lots are on a similar elevation. Mr. Leckstein questioned a window on the proposed third level, and Mr. Groves stated this was an attic window about 30' high. Mr. Leckstein asked if a berm or a greenhouse could be built on the property as an accessory structure, and Mr. Groves said a berm and greenhouse already exist. Mr. Leckstein said this did not require a

subdivision or any variance, and the property could be utilized for many uses without variances and a subdivision.

Gina Farkhouh, 16A Bellevue Ave., was sworn in and stated that the existing right-of-way has no access for the Carman's, and she asked how the right-of-way will be utilized. She also asked about the R-1 zoning, as well as the matter of a slope in the area. Mr. Groves, via an aerial map provided (A-10, dated 2011), pointed out the lots as shown on the map, and copies were provided to the attorneys. Mr. Leckstein questioned the contour lines as they pertain to the garden. Mr. Groves stated that they were similar to the Tate's. Mr. Gaziorowski thinks testimony on topography should be done by an engineer. The topography between the Carman and Farkhouh properties was addressed by Mr. Groves, who explained the drainage of the lots in the area. The placement of the proposed house also took into consideration the flow of the water in the area. Mr. Casazza said that the grading plan seems to indicate a different water flow, and it was noted that Mr. Santry will be testifying to this.

Mrs. Farkhouh does not think the Board is being given correct information. She thinks the plan is too large for the small piece of the lot, which does not include the right-of-way area, which she thinks is misleading in their plan. Mr. Von Arx said that the right-of-way is a part of the property and always has been. Their plan added some land, so that the property can meet the zone.

Mr. Gaziorowski asked Mr. Groves about the utilization of the property as a garden. He raised the issue of the restriction on the lot, and Mr. Von Arx objected to the question. The Board noted that they agreed they were not going to consider this aspect of the application.

Mr. Gaziorowski noted that the properties surrounding the lot in question are all in the R-1 Zone, and the requirements are greater than the R-3 zone. He stated that the neighbors have always been looking at this lot as a vacant lot, which has been used as a garden. He thinks it is clear that the proposed subdivided lot would not meet the standards, without their adding the portion of the dedicated conservation easement. He thinks the only reason they are adding the parcel is to satisfy the Zone. He feels the lot is undersized, by Mr. Groves stated this was incorrect, stating that he likes the layout proposed, and again noted that they would be allowed to build a 9,000 sq. ft. on the lot.

Mr. Leckstein has a problem with the Board's decision to hear the application without considering the issue of the restriction and how a problem could occur with their deliberations on the required variances to be considered.

At this time (9:30 p.m.) a short recess was taken.

At the resumption of the meeting, Thomas Santry was sworn in, and the Board accepted his qualifications as a licensed surveyor in the State of New Jersey. He surveyed the property for this application, and has visited the property and is familiar with the topography of the area. With regard to the drainage patterns, he explained how the drainage occurs at present, noting that the topography runs east to west. He pointed out, via A-10, the drainage on the lots, explaining that it is preferable to maintain the existing flow of water on the lots. The plan before the Board with access to the lot via the 40' right-of-way from Bellevue Ave. was confirmed by Mr. Santry. He stated that a 40' width is adequate for emergency vehicles, such as ambulances. Mr. Leckstein objected to his testimony as an engineer, and Mr. Gaziorowski also objected, since a surveyor is not licensed to do site plans. Mr. Santry said he has done site plans in the past.

Mr. Shanley asked who owns the right-of-way. Mr. Von Arx explained that the Farkhouh's share the ownership of the right-of-way with the Carman's, and this is included in the description in the deed.

Mr. Gaziorowski thinks the application is also a flag lot, and Mr. Steib said they have determined it is not a flag lot.

Mr. Leckstein asked if the property is draining properly, and Mr. Santry said it is draining naturally, and he explained how it functions on the lot. He explained how they intend to improve the drainage with their plan.

Mr. Casazza asked what the difference was in the height from Edgewood to the other end. Mr. Santry said it was about a 40' difference.

Mr. Gaziorowski asked Mr. Santry if the right-of-way was public or private, and Mr. Von Arx objected, since Mr. Santry is a surveyor and not qualified to make this determination. Mr. Santry's opinion was that it is a private right-of-way.

Mrs. Christine Nazzaro-Cofone, licensed professional planner, was sworn in, and the Board accepted her qualifications. Mr. Gaziorowski thinks her testimony should be limited, based on the nature of the restrictions on the lot. The Board will allow her to testify. Mrs. Nazzaro-Cofone explained her involvement with this application, noting that she has visited the property and is familiar with the general area. She described the area as an estate area with residential homes. The immediate area is in transition, with much development on nearby lots. She is familiar with the Rumson Zoning Ordinances and the provisions of the Master Plan, and her assessment takes these into consideration. The lot in question is oversized, with one portion fronting on Edgewood Rd. and the rear portion accessed off the right-of-way from Bellevue Ave. She has studied the application, and commented on the variances required. The proposed Lot #4.02 is conforming with respect to area. They are asking to take a subdivision line and create a sellable lot on the back portion of the property. If the subdivision is approved, the Zone dividing line will still exist in its present location. They propose to take a portion of the front lot and add it to the back lot for the purpose of subdividing. She explained the differences in the lot area requirements for the two zones. She also pointed out the lots between Bellevue Ave. and Buena Vista Ave., noting that only three are larger than two acres, so their lot size is consistent with what is occurring in the neighborhood today.

The three variances for Lot 4.02 include:

- No frontage on municipal right-of-way (40' frontage on private right-of-way);
- Lot circle requirement (115' required / 99' provided);
- Lot width / frontage (200' required / 186.32 provided).

Mrs. Nazzaro-Cofone characterized the variances as "C" bulk requirements for the R-1 Zone. They can be granted under the C-1 hardship criteria:

- Unique or unusual shape of property;
- Unique topography of property;
- Some other condition relating to the property.

She thinks the Board can relate these criteria to this property, and she proceeded to explain her reasons for this. If they find that there is no hardship, the Board can still grant the variances if they find it meets the

purpose of the Land use Law, and she thinks there are a few of these explanations that could meet this criteria.

She noted that the lots exceed or meet the minimum requirements for the zone. Also, in 2002, the Master Plan Reexamination Report identified problems in the borough and how they could solve these problems. She pointed out a section of this report that referred to increasing the lot sizes to preserve the character of a neighborhood. She thinks there is sufficient space to allow for this property to be developed, and it is an appropriate size for the area. Also, the creation of the additional buffer will serve to benefit the area. She thinks they are able to demonstrate several areas of the Land Use Law that would be advanced with this application.

The variances they are requesting are technical in nature and would not adversely affect the area or add any substantial detriment to the zone plan. Their burden or proof has been satisfied to grant the application, in her opinion. They are also bringing the benefit of the easement. She offered case histories that support her evaluation of this application. If the applicants were willing to restrict any further subdivision of the Edgewood property by a deed restriction running for the benefit of the Borough, this would provide more open space and protect the area from further subdivision. She reported on other areas in Rumson that also depend on access from a private right-of-way. She stated that from her point of view, the application includes three "C" variances, although she is aware of the other complicating issues involved.

Councilman Rubin questioned the population density testimony, and Ms. Nazzaro-Cofone explained how she arrived at her opening as to applying this to the positive criteria.

Mrs. Farkhouh asked Mrs. Nazzaro-Cofone about her testimony regarding the transitional nature of the area, and Mrs. Nazzaro-Cofone proceeded to review her testimony regarding the nearby lots that are currently under construction, and she restated her opinion that the 3,900 sq. ft. proposed home would be consistent with many in the neighborhood. Mrs. Farkhouh thinks that the suggestion that the neighborhood is under transition is not correct, since most of the homes are large or of an estate nature. She thinks the testimony that this house is consistent is misleading. Mrs. Nazzaro-Cofone stated that the proposed house on Lot 4.02 will be smaller than some in the area, but it is her contention that the area is definitely under transition with much construction on nearby lots.

Mr. Gaziorowski asked if the Lot 4.02 would be considered a flag lot, and Mrs. Nazzaro-Cofone responded that it is not a traditional flag lot. He also asked if Mrs. Nazzaro-Cofone has ever seen an application with a lot configuration such as this, and she stated she did not recall.

Mr. Gaziorowski provided a copy of the subdivision map from 1973 (O-1). He asked about the hardship justification as testified to by Mrs. Nazzaro-Cofone pertaining to the unusual shape of the lot, noting that this unusual shape occurred and was created by the owner of Lot #3, connecting it with the north portion of the lot on Edgewood Rd., which he feels is a self-created hardship. He pointed out a condition in the deed filed at that time, which states that no dwelling should be erected on the portion of the added property. He asked her about her testimony as to the potential subdivision of the lot in the R-3 zone. Mr. Von Arx suggested Mrs. Nazzaro-Cofone not answer the questions regarding the planning from 1973, and the Board upheld this decision.

Due to the late hour, the application will be carried, with no further notice required. Mr. Von Arx will grant an extension of the time limit. Mr. Leckstein asked if the matter could be carried to the February

meeting, as he is not available for the January meeting. Mr. Von Arx will agree to further extend the time limit through the February 4th meeting.

At this time (11:00 p.m.) and there being no further business and no need for any executive session, motion was made and seconded to adjourn. Voice Vote: Ayes, unanimous.

The next meeting is **January 7, 2013.**

Respectfully submitted,
Patricia Murphy
Clerk